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NO. 80-2017

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROY SNEAD, JR., SHERIFF, AND
FORREST DOBBINS, CLERK OF THE
CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA,

Petitioners

V.

J. L. STRINGER, ALSO KNOWN AS
REV. JUDGE L. STRINGER,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONER

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REPLY ARGUMENT

I.

ON THE MASSIAH ISSUES

Mayor Stringer frankly admits that the Rule of Massiah v. United States (377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1119 [1964]) does not bar all counselless contacts between prosecuting officials and indictees. However, he vehemently denies a contrary position by himself or the District Court. Then, having denied the position, he advances it. Consider the following random quotations from Mayor Stringer's brief:

> ". . .Stringer had a right to counsel when the call (contact) was made. . . ." (Resp. Br. p. 7)

> ". . .The argument [of Petitioner] as presented, is clearly an effort to place a cloud over what was a counselless contact...." (Resp. Br. pp. 7-8)

> ". . .The argument [of Petitioner]. . .simply conglomerates two underlying crucial determinations, which have heretofore been addressed by this Court; those being:
>
> 1. The rights of an indicted person to counsel when contacted by police and prosecutorial officials...." (Resp. Br. pp. 11-12)

The Petitioner must argue this way since, if it is conceded that any counselless contact is permissible, the most obviously permissible one would be a contact with an indicted public official concerning public records.

For reasons which this writer cannot grasp, this sort of "double think" has characterized this case throughout its history in the Federal Courts. Consider, for example, the District Court's holdings: (1) That the District Attorney had no improper motive in making the telephone call, but (2) violated Mayor Stringer's Constitutional rights by securing an admission against interest.

This Honorable Court has never had any occasion to address the question of whether an indicted public official's Sixth Amendment rights extend to public records under his official custody. Neither Massiah, supra, nor any case following it came close to the facts in this case. Another way of putting this question is suggested by Mayor Stringer: Whether a "zone of privacy" (Resp. Br. pp. 7 and 16) is created around an indicted public official which extends to his official records. Mayor Stringer argues that there were other ways to obtain these records, but this does not answer the question of whether the way used was proper. The other ways would have raised other questions. For example, a subpoena would have been delivered by the sheriff and would likewise have involved a counselless contact. Clearly this case presents an important novel question

In Massiah, above, this Honorable Court wrote:

> ". . .We hold that the petitioner was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he was indicted and in the absence of his counsel. . . ." (377 U.S. 201, 206, 12 L. Ed. 2d 246, 250) (Emphasis supplied)

This is the Massiah Rule on the basis of which a new trial was ordered for Mayor Stringer. Since Massiah this Honorable Court has applied the Rule several times and has never deviated one way or the other from the intentional elicitation requirement. See, for example, Brewer v. Williams (430 U.S. 387, 399 ff. 51 L. Ed. 2d 424, 436 ff, 97 S. Ct. 1232 [1977]) and United States v. Henry (___U.S.___, 65 L. Ed. 2d 115, 122 ff., 100 S. Ct. ___ [1980]) In holding that the District Attorney, having no improper motive, vio-

lated Mayor Stringer's rights by hearing Stringer's unelicited admission, the lower Federal Courts clearly ruled contrary to the prior opinions of this Honorable Court.

II.

ON HARMLESS ERROR

What error could be more harmless than evidence proving a fact admitted by the adverse party and material primarily to a charge on which the party is acquitted? The harmlessness of such evidence is too obvious to merit discussion. In order to get around this obvious point, the District Court ignored some evidence and minimized the effect of the rest, rejected the State Court implied finding that the State's evidence was sufficient to take both charges to the jury and ruled contrary to the prior decisions of this Honorable Court. E.g. Jackson v.

Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781 (1979).

CONCLUSION

In conclusion the Petitioners again respectfully submit that this case presents an important question of Federal Constitutional Law which has not been but ought to be decided by this Honorable Court and conflicts with prior opinions. For these reasons the Petitioners again pray that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Sheriff Snead and Forrest Dobbins, Petitioners, do hereby certify that on this ___ day of August, 1981, I did serve the requisite number of copies of the foregoing on the Attorney for J. L. Stringer, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

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